No. _____

In The
Supreme Court of the United States

MOATH HAMZA AHMED AL-ALWI,

Petitioner,

v.

DONALD J. TRUMP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004), this Court understood the Authorization for Use of Military Force to include implicit authority to detain for the duration of the relevant conflict combatants who fought U.S. forces in Afghanistan. It cautioned, however, that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." Twice in the past decade, that prescient warning was repeated. *See Boumediene v. Bush*, 553 U.S. 723, 797-98 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."); *Hussain v. Obama*, 572 U.S. 1079 (2014) (statement of Breyer, J., respecting denial of certiorari) (noting the Court had not "considered whether . . . either the AUMF or the Constitution limits the duration of detention" when the conflict's circumstances are entirely unlike those of prior conflicts). Today, seventeen years after the United States detained Moath al-Alwi at Guantánamo Bay, the questions presented are:

I. Whether the government's statutory authority to detain Mr. al-Alwi has unraveled.

II. Alternatively, whether the government's statutory authority to detain Mr. al-Alwi has expired because the conflict in which he was captured has ended.

QUESTIONS PRESENTED—Continued

III. Whether the Authorization for Use of Military Force authorizes, and the Constitution permits, detention of an individual who was not "engaged in an armed conflict against the United States" in Afghanistan prior to his capture.

PARTIES TO THE PROCEEDING

Petitioner in this Court and the appellant in the court below is Moath Hamza Ahmed al-Alwi, a Yemeni national imprisoned at the U.S. Naval Station at Guantánamo Bay, Cuba since 2002. Respondents in this Court and the appellees in the court below are Donald J. Trump, President of the United States; James Mattis, Secretary of Defense; Rear Admiral John C. Ring, Commander, Joint Task Force-Guantánamo; and Colonel Steven G. Yamashita, Commander, Joint Detention Operations Group, JTF-GTMO.[1]

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Petitioner has inserted in this filing the names of individuals currently holding these official positions, all of whom are named in their official capacities.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the district court, appended at App. 17, was issued on February 21, 2017 and reported at 236 F. Supp. 3d 417. The opinion of the court of appeals, at App. 1, was issued on August 7, 2018 and reported at 901 F.3d 294.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 7, 2018. On October 18, 2018, Chief Justice Roberts extended the time for filing this petition for certiorari to and including December 5, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Due Process Clause, U.S. CONST. amend. V, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

The Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) (2001) is at App. 31-32 and the National Defense Authorization Act, Pub. L. No. 112-81, § 1021 (2012), is at App. 33-35.

STATEMENT OF THE CASE

I. Background

A. Mr. al-Alwi's Capture and Detention

Moath al-Alwi is a Yemeni citizen, born and raised in Saudi Arabia, where his large and supportive family still resides. In late-2000 or early-2001, Mr. al-Alwi left Saudi Arabia for Afghanistan. He was in northern Afghanistan on October 7, 2001, when the United States began its post-9/11 bombing operation. Mr. al-Alwi fled for safety to Pakistan, arriving as the United States flooded the area with flyers offering bounties for "suspicious" people. Bounty hunters delivered 369 people—often captured on the basis of their Arab ethnicity—to the United States, many for $5000 each.[2] Mr. al-Alwi was seized and delivered to the United States, who then rendered him to Guantánamo Bay.

[2] *See* Mona Samari, *Bounties Paid for Terror Suspects*, AMNESTY INT'L (Jan. 16, 2007); PERVEZ MUSHARRAF, IN THE LINE OF FIRE: A MEMOIR 239-43 (2006).

Mr. al-Alwi has been indefinitely detained there for seventeen years, since January 16, 2002. He was never charged or sentenced, and the executive indicates no intention to do so. The courts that earlier adjudicated his habeas corpus petitions found no evidence that Mr. al-Alwi ever used arms against the United States or its coalition partners, or that he had anything to do with 9/11 or other attacks on the United States. *See Al Alwi v. Bush*, 593 F. Supp. 2d 24, 28 (D.D.C. 2008) ("[T]here is no evidence of petitioner actually using arms against U.S. or coalition forces."). Hundreds of his former fellow prisoners—many facing far worse accusations, some even convicted of war crimes—now live free. Forty prisoners remain today.[3] Still, the executive claims statutory authority to keep Mr. al-Alwi incarcerated. Its expansive view of detention authority has created the realistic prospect of lifetime imprisonment without trial for Mr. al-Alwi—a situation so repellent to basic principles of justice that the Court should now wield its constitutional authority over petitions for habeas corpus to limit the length of military detention.

B. The Evolution of the Afghan Conflict Since 2001

The United States began the military campaign named Operation Enduring Freedom by bombing

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[3] *See The Guantánamo Docket*, N.Y. TIMES (last updated May 2, 2018), https://www.nytimes.com/interactive/projects/guantanamo. Only nine of them are facing charges before the military commissions or have already been convicted.

Afghanistan on October 7, 2001, pursuant to the Authorization for Use of Military Force passed by Congress shortly before. Pub. L. No. 107-40, § 2(a) (Sept. 18, 2001) ("AUMF"). Its objectives were to topple the Taliban regime and dismantle al-Qaida. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 337-38 (2004).[4] By early December 2001, the Taliban had been driven from power. In June 2002, Hamid Karzai was elected president of the Transitional Islamic State of Afghanistan ("TISA"). *See* KENNETH KATZMAN & CLAYTON THOMAS, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 8 (Aug. 22, 2017) ("CRS Afg. Rep't"). By January 2004, Afghanistan had a new constitution, and by November 2004, Karzai had been elected president. *Id.* Afghanistan today is a sovereign nation with no legal connection to the Taliban.

On May 1, 2003, the United States declared an end to "major combat" in Afghanistan. *Id*. at 7. Fighting nevertheless continued for the next decade. Throughout this period the United States took the leadership role in military operations, and U.S. forces sustained significant casualties. DEP'T OF DEF., REPORT ON ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 29 (June 2015).

On May 1, 2011, U.S. forces killed Usama bin Laden. The Taliban's leader, Mullah Omar, died in

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[4] *Available at* https://9-11commission.gov/report/911Report.pdf (last visited Nov. 25, 2018).

2013. CRS Afg. Rep't 18. The United States began transitioning security operations—including detention—to the Afghan government. In 2014, President Obama began declaring that the combat mission in Afghanistan had ended and that the war was reaching its close. *See*, *e.g.*, Barack H. Obama, President of the United States, State of the Union Address to the Congress of the United States (Jan. 20, 2015) ("Tonight, for the first time since 9/11, our combat mission in Afghanistan is over.").[5]

On September 14, 2014, the United States and Afghanistan entered into a Bilateral Security Agreement that profoundly curtailed U.S. military operations in Afghanistan and still governs the terms of U.S. military presence there. Bilateral Security and Defense Cooperation Agreement, U.S.-Afg., Sept. 30, 2014, T.I.A.S. No. 15-101 ("BSA").[6] The BSA provides that "United States forces shall not conduct combat operations in Afghanistan" nor engage in unilateral U.S. military counterterrorism operations there. *Id.* at 4. Instead, U.S. action is "intended to complement and support [Afghan National Defense and Security Forces'] counter-terrorism operations, with the goal of maintaining ANDSF lead, and with full respect for Afghan sovereignty[.]" *Id*. The BSA further provides that U.S. forces may not "maintain or operate detention facilities

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[5] *Available at* https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015.

[6] *Available at* https://www.state.gov/documents/organization/278374.pdf.

in Afghanistan." *Id*. at 5. Upon request by Afghan authorities, the United States must remove members of its armed forces or civilian employees. *Id*. at 15.

With that, Operation Enduring Freedom ended. The United States launched a new campaign, Operation Freedom's Sentinel, intended to train, advise, and assist Afghan forces. At the peak of the conflict during Operation Enduring Freedom, 100,000 U.S. troops were in Afghanistan. As of November 2018, there were about 14,000 troops in Afghanistan.[7]

The current enemy in Afghanistan consists of a collection of tribal and religious groups and alliances that has fragmented and morphed so often it is difficult to follow. CRS Afg. Rep't 18-22. Although it includes Taliban and al-Qaida fighters and associated groups, it also includes groups that had nothing to do with the 9/11 attacks and were not even formed at the time, such as ISIL-K[horasan]. DEP'T OF DEFENSE, ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 8 (Dec. 2016). ISIL-K was not named as a foreign terrorist organization by the State Department until January 14, 2016. *Id*.

The military has also used the 2001 AUMF to justify military operations against numerous other

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[7] *See* Todd South, *Report: Enemy Attacks Decrease in Afghanistan, but Airstrikes, Deaths Rise as Urban Centers Remain Vulnerable*, MILITARY TIMES (Nov. 19, 2018), *available at* https://www.militarytimes.com/news/your-military/2018/11/19/report-enemy-attacks-decrease-in-afghanistan-but-airstrikes-deaths-rise-as-urban-centers-remain-vulnerable/.

groups in at least six different countries. *See* White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 5, 15-19 (2016) (stating that AUMF supports operations against al-Qaida, the Taliban, and affiliates, as well as al-Qaida in the Arabian Peninsula, al-Shabaab, al-Qaida in Libya, al-Qaida in Syria, and ISIL, and identifying operations in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen).

Although hostilities in Afghanistan continue against some of these groups, the United States now serves in a supportive and subordinate role, with Afghanistan leading its own fight.

II. Mr. al-Alwi's Habeas Litigation

A. First Habeas Petition

In his initial habeas petition, Mr. al-Alwi argued that the United States wrongly categorized him as a Taliban or al-Qaida fighter based on flimsy evidence that courts of law would not credit under ordinary standards of proof. Deferring broadly to hearsay and other questionable forms of evidence, and permitting inferences (if not irrebuttable presumptions) from potentially innocuous acts such as brief stays at guesthouses that the military associated with the Taliban or al-Qaida, the district court denied Mr. al-Alwi's first habeas petition in 2008.

The circuit court affirmed, although Mr. al-Alwi argued that the chief evidence against him came from unreliable interrogation reports and that he was abused, threatened, and humiliated throughout the period these statements were reported. Brief for Petitioner at 54-55, *Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011) (No. 09-5125). Neither court found any evidence that Mr. al-Alwi ever used arms against the United States or its coalition partners, much less that he had anything to do with 9/11 or any other plots.

B. Second Habeas Petition

In 2015, Mr. al-Alwi filed a second habeas corpus petition contending that his continued imprisonment violates the Constitution, the AUMF, and the law of war. The government moved to dismiss. After languishing for over a year, the government's motion was heard in the district court in late-2016. The court denied the petition in 2017. *Al-Alwi v. Trump*, 236 F. Supp. 3d 417 (D.D.C. 2017). It held that "whether 'active hostilities' have ceased . . . is a political decision," following *Al-Bihani v. Obama*, 590 F.3d 866, 873 & n.2 (D.C. Cir. 2010), *reh'g denied*, 619 F.3d 1 (D.C. Cir. 2010). *Id.* at 420. Because Congress and the President agreed active hostilities existed in Afghanistan, the court deferred. *Id.* at 422.

The court of appeals held that the AUMF as interpreted by this Court and the 2012 National Defense Authorization Act permit unlimited detention for as long as hostilities continue in the executive's view. *Al-Alwi v. Trump*, 901 F.3d 294, 297-98 (D.C. Cir. 2018).

The court dismissed *Hamdi*'s concern about the duration of the war, along with like concerns expressed by this Court in *Boume-diene* and by Justice Breyer in *Hussain*, as speculation, and stated that these authorities were "not controlling." *Id.* at 298. The court of appeals held that the political branches have virtually unfettered authority to define the conflict. *Id.* at 299. The court of appeals did not reach Mr. al-Alwi's due process arguments, concluding that they had been forfeited. *Id.* at 301.

REASONS FOR GRANTING THE PETITION

I. This Court Should Determine Whether the Executive's Authority to Detain Mr. al-Alwi Has Unraveled

Over fourteen years ago, when this Court interpreted the AUMF to include the implied authority to detain during the course of the Afghan conflict, it took seriously the specter of indefinite, lifelong imprisonment of individuals captured in a war with "broad and malleable" underpinnings that could plausibly continue for two generations. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality). Only three years after the enactment of the AUMF, this Court cautioned that its understanding of detention authority for the duration of the conflict, informed by law of war principles, "may unravel" if the practical circumstances of the Afghan conflict become "entirely unlike those of the conflicts that informed the development of the law of war." *Id.* at 521.

Since then, this Court has maintained that the time may come when judicial limits on detention authority may be necessary. *See Boumediene v. Bush*, 553 U.S. 723, 797-98 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."); *Hussain v. Obama*, 572 U.S. 1079 (2014) (statement of Breyer, J., respecting denial of certiorari) (Court has not "considered whether . . . either the AUMF or the Constitution limits the duration of detention.").

Now, the time for the Court to impose limits on perpetual military detention has come. The conflict in Afghanistan has continued for more than seventeen years, and Mr. al-Alwi has been imprisoned by the United States without charge or trial for nearly as long. The lower courts' failure to weigh properly how the current conflict differs from past conflicts that informed the development of the law of war creates the risk of lifelong detention for him. Continued imprisonment raises serious constitutional questions—which the Court should avoid by limiting AUMF detention authority—and violates the law of war and other international norms.

A. The Court of Appeals Disregarded this Court's Guidance that Statutory Detention Authority May Unravel Over Time

The court of appeals failed to meaningfully consider whether practical circumstances have ceased to support detention authority for the conflict's duration. In doing so, the court below treated as surplusage this Court's guidance that the executive's detention authority may unravel over time. It deemed this Court's pronouncements "not controlling" and dismissed them as "Al-Alwi's theory of unraveling authority," instead of respecting them as important qualifications on the law. *See Al-Alwi*, 901 F.3d at 298.

The court of appeals interpreted *Hamdi* as a blanket endorsement of perpetual detention for as long as conflict continues in Afghanistan. *See id.* ("[W]e continue to follow *Hamdi*'s interpretation of the AUMF. . . . [It] authorize[s] detention until the end of hostilities. Although hostilities have been ongoing for a considerable amount of time, they have not ended. . . . Therefore, we reject Al-Alwi's argument that the United States' authority to detain him has 'unraveled.'"). By holding that detention authority endures merely because hostilities are ongoing in Afghanistan, regardless of their circumstances or length, the court of appeals rendered meaningless parts of *Hamdi* and *Boumediene* and dismissed Justice Breyer's statement in 2014 that this question was ripe for review.

If the D.C. Circuit's interpretation of *Hamdi* stands, no set of practical circumstances differentiating the

Afghan conflict from its predecessors could impact the government's authority to imprison Mr. al-Alwi. For *Hamdi* to have any meaning, the plurality must have envisioned that changes in the conflict's practical circumstances other than a formal declaration of surrender could affect the judicial understanding of detention authority. And if the differences in duration and other circumstances setting apart this conflict from its predecessors are not sufficient, it is hard to imagine what differences would be. The language in *Hamdi* would be rendered hollow.

To justify its dismissal of this Court's pronouncements, the court of appeals declared that the National Defense Authorization Act ("NDAA") of 2012 "permits" and "authorize[s]" detention until the end of hostilities with no limits. *Al-Alwi*, 901 F.3d at 298 (citing Pub. L. No. 112-81, § 1021). The statute does no such thing. It merely "affirms" this Court's understanding of existing detention authority, pointing back to the AUMF as the sole source of such authority. In fact, the NDAA expressly disclaims any intent to alter the landscape, leaving this Court's interpretation of AUMF detention authority undisturbed. *See* Pub. L. No. 112-81, § 1021(d) (2012) ("Construction—Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force."). With the NDAA, Congress neither supplanted nor amended the AUMF as the fount of detention authority, nor is it clear that it could have done so through an authorization act. *Cf. New York Airways, Inc. v. United States*, 369 F.2d 743, 749 (Ct. Cl. 1966)

("The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest.").

The court below essentially ignored the question whether the conflict's practical circumstances have undermined the executive's detention authority. *See Al-Alwi*, 901 F.3d at 298. ("Al-Alwi's cited authorities merely suggest the possibility that the duration of a conflict may affect the Government's detention authority and, in any event, are not controlling. . . . These statements, then, do not provide a 'foundation' for Al-Alwi's theory to prevail or persuade.") (discussing *Hamdi*, *Boumediene*, and *Hussain*). Because no other federal court of appeals hears Guantánamo cases, the decision below is likely to be the last word on this point absent review by this Court, consigning detainees like Mr. al-Alwi to indefinite detention that is tantamount to a sentence of life imprisonment.

B. The Court Should Set Limits on Perpetual Military Detention

The circumstances of the Afghan conflict should impel the Court to decide whether the duration of AUMF detention authority has any judicially enforceable limit. Given the weighty questions that perpetual detention would raise, the canon of constitutional avoidance demands a limiting construction. Denying certiorari would allow Mr. al-Alwi's detention without charge for the duration of a conflict with no foreseeable end, in defiance of domestic and law-of-war norms.

1. The Unprecedented Duration and Other Practical Circumstances of the Current Conflict Require the Court to Limit Detention Authority

The current circumstances of the war in Afghanistan are entirely unlike those of the conflicts that informed the development of the law of war or, indeed, those of the same conflict when this Court initially construed the AUMF to include detention authority. The duration alone of the conflict in Afghanistan—if viewed as a single, continuous event—makes it entirely unlike the conflicts of limited duration that informed the development of the law of war. In 2008, this Court noted that Guantánamo cases "lack any precise historical parallel" because they concern "individuals detained by executive order for the duration of a conflict that . . . is already among the longest wars in American history." *Boumediene*, 553 U.S. at 771. Ten years later, it is definitively the longest war in this country's history, with no end in sight.

This Court has repeatedly noted that the conflict's duration may require the judiciary to revisit the detention authority read into the AUMF. In *Hamdi*, the Court clarified that "as of this date," only three years into the war, limiting detention authority was not yet warranted. 542 U.S. at 521. The Court explained that the law-of-war principles informing its understanding of AUMF detention authority flowed from conflicts "of limited duration," allowing the Court to "leave the outer boundaries of war powers undefined." *Boumediene*, 553 U.S. at 797-98. But it stated that if "terrorism

continues to pose dangerous threats to us for years to come, the Court might not have this luxury." *Id*. Most recently, Justice Breyer reiterated "that the President's power to detain under the AUMF may be different" depending on the changed circumstances of the relevant conflict and noted that the Court had yet to consider "whether . . . either the AUMF or the Constitution limits the duration of detention." *Hussain*, 572 U.S. 1079 (2014) (statement of Breyer, J., respecting denial of certiorari).

Other practical circumstances of this conflict are also wholly unlike those that informed the development of the law of war. The amorphous nature of this transnational war against non-state entities, and the evolution of its "broad and malleable" underpinnings, *see Hamdi*, 542 U.S. at 520, constitute a uniquely contemporary phenomenon. Military operations under the AUMF have not been contained to Afghanistan, but have also taken place in Iraq, Libya, Somalia, Syria, and Yemen. The parties to the war have shifted, as groups hostile to the United States and its partners have come and gone, regrouped and dissolved. The absence of defined geographical boundaries, duration, or identity of combatants creates a conflict of indeterminate nature and scope that may never see a cessation of hostilities in the traditional sense. Under these circumstances, the presumption that detention is lawful until the cessation of hostilities—a presumption taken from the rules governing conventional international armed conflict—can no longer apply.

At this stage, as this Court presciently cautioned over a decade ago, the judiciary no longer has the "luxury" to "leave the outer boundaries of war powers undefined." *Boumediene*, 553 U.S. at 797-98. This conflict is not of limited but indefinite duration. It is now incumbent on this Court to determine where those outer boundaries fall and if they have been crossed for Mr. al-Alwi.

2. Potentially Lifelong Imprisonment Would Be Unlawful

The alternative to a narrowing judicial construction of AUMF detention authority is potentially lifelong imprisonment, which would offend the Constitution and the law of war. When this Court first interpreted detention authority in the AUMF in *Hamdi*, the Afghan conflict was still relatively young. Today, as that conflict enters its eighteenth year, the prospect of lifelong imprisonment is no longer speculative.[8] If AUMF detention authority is deemed unlimited, the Court must then consider whether the Constitution

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[8] *See, e.g.*, Exec. Order No. 13823, 83 Fed. Reg. 4831 (Jan. 30, 2018) (revoking Executive Order that ordered closure of Guantánamo detention camps and ordering detention operations to continue); Donald J. Trump (@realdonaldtrump), TWITTER (Jan. 3, 2017, 9:20 AM), https://twitter.com/realDonaldTrump/status/816333480409833472 ("There should be no further releases from Gitmo."); Josh Ledermen, *Tillerson to Abolish Most Special Envoys, Including Guantánamo "Closer,"* MIAMI HERALD (Aug. 28, 2017), *available at* http://hrld.us/2Fd7b13.

and the laws of war permit potentially lifelong imprisonment.

a. An Interpretation of the AUMF that Allows Potentially Lifelong Imprisonment Would Violate the Constitution

Mr. al-Alwi's lengthy imprisonment, if allowed to continue, would raise constitutional questions that this Court should avoid. In *Clark v. Martinez*, the Court observed that a single detention provision could not be given different meanings as to different classes of individuals. 543 U.S. 371, 379 (2005). The decision reaffirmed the canon that where one of two plausible interpretations of a statute authorizing detention raises constitutional doubt, "the other should prevail." *Id.* at 380-81. Importantly, it explained, this holds "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id*.

The statute at issue in *Clark* provided "no distinction between admitted and nonadmitted aliens." *Id.* at 379. Similarly, the AUMF has been construed to authorize detention of citizens and noncitizens alike. *See Hamdi*, 542 U.S. at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant."). An interpretation of the AUMF permitting indefinite, potentially lifelong detention of the sort Mr. al-Alwi has endured at Guantánamo for seventeen years would raise constitutional questions with respect to a U.S. citizen. Therefore, consistent with *Clark*,

the Court must eschew that interpretation in favor of another that imposes a durational limit on AUMF detention authority.[9]

This Court has long held government action that "shocks the conscience" to stand at odds with our Constitution's guarantee of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); U.S. CONST. amend. V. In the analogous context presented by pretrial detainees who, like Mr. al-Alwi, never received the protection of a criminal trial, the proper question is whether their conditions of confinement "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979). Mr. al-Alwi's extended detention amounts to punishment without charge. Seventeen years of detention along with the prospect of lifelong imprisonment, even apart from the conditions at Guantánamo, can be fairly characterized as "genuine privations and hardship over an extended period of time." *Id.* at 542; *cf. Ali v. Obama*, 736 F.3d 542, 553 (D.C. Cir. 2013) (Edwards, J., concurring) ("It seems bizarre, to say the least, that [a detainee], who has never been charged with or found guilty of a criminal act and who has never 'planned, authorized, committed, or aided [any] terrorist attacks,' is now marked with a life sentence."); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465-66 (D.D.C. 2005) ("Short of the death penalty, life imprisonment is the ultimate

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[9] This Court clarified that "when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others[;] he seeks to vindicate his own *statutory* rights." *Clark*, 543 U.S. at 382.

deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term."), *vacated*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008). Seventeen years in, Mr. al-Alwi's imprisonment without charge and with no end in sight shocks the conscience.

This Court's prior rulings do not prevent application of the Due Process Clause to Mr. al-Alwi's claims of unlawful and indefinite detention. *See Boumediene*, 553 U.S. at 784-85 (assuming without deciding "that the CSRTs satisfy due process standards" but without questioning Due Process Clause's application to noncitizens detained at Guantánamo); *Hussain*, 572 U.S. at 1079 (statement of Breyer, J., respecting denial of certiorari) (Court has not determined whether Constitution may limit duration of detention at Guantánamo); *cf. Kiyemba v. Obama*, 563 U.S. 954 (2011) (Breyer, Kennedy, Ginsburg, Sotomayor, JJ., statement respecting denial of certiorari) (third country's offer to resettle detainees transformed their due process claim seeking entry into the United States, which, should circumstances change in the future, may be raised again before the Court). Substantive due process demands that limits be placed on detention authority to prevent lifelong imprisonment without charge or conviction of any crime.

Given the liberty interest at stake for Mr. al-Alwi after seventeen years of detention, review by this

Court is necessary to define whether executive power is at all confined by substantive due process.

b. Perpetual Detention Is Inconsistent with Longstanding Law-of-War Principles

The executive's authority to detain Mr. al-Alwi does not flow from the plain language of the AUMF, but from the law-of-war principles that inform the statute. *See Hamdi*, 542 U.S. at 521. International humanitarian law provisions on detention were adopted to prevent indefinite detention, not sanction it. In International Armed Conflicts ("IAC"), the Geneva Conventions require that prisoners of war be "repatriated without delay after the cessation of active hostilities." Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364. The framers of Article 118 of the Third Geneva Convention "recognized that captivity is a painful situation which must be ended as soon as possible, and [were] anxious that repatriation should take place rapidly and that prisoners of war should not be retained in captivity on various pretexts." INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 546 (J. de Preux gen. ed., 1960). Article 75 of Additional Protocol I also demanded that persons detained for reasons other than penal offenses "be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

Protocol Additional to the Geneva Conventions of 12 August 1949 art. 75, at 53, Nov. 30, 1993. The court of appeals inverted this foundational premise of international humanitarian law, taking what was created to limit detention and interpreting it to sanction perpetual detention.

While this Court has yet to classify the conflict in Afghanistan as either an IAC or a Non-International Armed Conflict ("NIAC"), *see Hamdan v. Rumsfeld*, 548 U.S. 557, 628-29 (2006) ("We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories."), the executive has argued that the hostilities authorized by the AUMF are a NIAC. *See* The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 19, 32 (2016) (stating that the United States is engaged only in NIACs). While a NIAC corollary to Article 118 of the Third Geneva Convention or Article 75 of Additional Protocol I does not exist, this is not because indefinite detention is permitted in NIACs. Rather, international humanitarian law is relatively silent on durational limits for detention in NIACs only because the framers of the Geneva Conventions assumed that NIACs would be internal, intra-state conflicts between government forces and a non-state party or between two non-state parties. The possibility of a transnational conflict that was non-international in nature would have seemed farfetched at the time. And in a domestic NIAC, any

"rebels" apprehended by government forces would be processed in accordance with domestic law, subject to the durational limits on detention provided in domestic criminal or administrative statutes and procedures. In this way, the law of NIACs would support charging a long-term detainee like Mr. al-Alwi under U.S. criminal statutes, or releasing him.

International Human Rights Law also prohibits indefinite detention. *See, e.g.*, International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), U.N.T.S. 171 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."); Committee Against Torture, Conclusions and Recommendations on the Second Periodic Report of the United States of America, 36th Sess. May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2, ¶ 22 (2006) ("[D]etaining persons indefinitely without charge [at Guantánamo] constitutes per se a violation of the Convention [Against Torture.]"); *A. v. Sec'y of State of the Home Dep't*, [2005] 2 AC 68, ¶ 222 (H.L.) ("[N]either the common law . . . nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned.").

Hamdi's qualified rule that the AUMF authorizes detention for the duration of hostilities expresses a general principle that stems from wars of limited duration and scope—hence its nod to the possibility of "unraveling." 542 U.S. at 521. Traditional wars informing law-of-war principles were of "limited duration," *Boumediene*, 553 U.S. at 797. The current conflict is

limited neither in duration nor scope, raising the real prospect of perpetual detention. Rigid adherence to the requirement of a cessation of hostilities in this unprecedented context would defeat the purpose of international humanitarian law and contravene human rights law's prohibitions on arbitrary or indefinite detention. Mr. al-Alwi's continuing imprisonment without the sanction of a trial or conviction therefore must be ended.

II. Alternatively, the Court Should Determine if Detention Authority Endures After the "Relevant Conflict" in Which Mr. al-Alwi Was Detained Has Ended

In *Hamdi*, the plurality observed that "Congress' grant of authority for the use of 'necessary and appropriate force' . . . include[s] the authority to detain for the duration of the relevant conflict." 542 U.S. at 521. As Justice Breyer later explained, the *Hamdi* plurality "concluded that the detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is an exercise of the necessary and appropriate force that Congress authorized under the AUMF." *Hussain*, 572 U.S. at 1079. The "relevant conflict" that ostensibly supported Mr. al-Alwi's detention in 2001 was a war between two state parties—the United States and Taliban-governed Afghanistan—with the Taliban supported by al-Qaida, a non-state party. Seventeen years after the AUMF and fourteen years after *Hamdi*, the original Afghan conflict is virtually

unrecognizable. This Court should now decide whether the political branches have plenary, unreviewable authority to declare the "relevant conflict" ongoing, foreclosing any independent judicial determination of detention authority, as the lower courts basically held.

A. The Relevant Conflict Has Effectively Ended

In the annals of American warfare, the Afghan conflict is unique not only for its longevity, but also for its mutability. Although hostilities in Afghanistan continue against some of the same groups, the United States now serves in a supportive and subordinate role—in a fight that looks nothing like the combat operation that began in 2001. Indeed, it is now Afghanistan's fight, being waged with U.S. backing. The United States has even ceded authority to end the war. *See* DEP'T OF DEF., ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 6 (June 2017) ("The United States continues to support an Afghan-led, Afghan-owned reconciliation process and supports any process that includes violent extremist groups laying down their arms.").

The original conflict has changed in name as well as in nature. Mr. al-Alwi was captured during Operation Enduring Freedom ("OEF"), a U.S.-led war in Afghanistan consisting of combat missions conducted pursuant to AUMF authority. During OEF, the United States deployed hundreds of thousands of troops to

Afghanistan and incurred significant casualties. DEP'T OF DEF., REPORT ON ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 29 (June 2015).[10] The United States also engaged in unilateral combat operations—or active hostilities—against the Taliban and al-Qaida, and targeted individuals based on their membership in either group.

The United States achieved its objectives in OEF. It displaced the Taliban, decimated al-Qaida, and decapitated both organizations. An entirely new government was installed in Afghanistan, which has run the country for over a decade. The United States steadily withdrew troops in accordance with its plan to cede security operations to Afghanistan. At the time of the hearing in the district court, the number of U.S. troops in Afghanistan was less than one-tenth what it was at OEF's peak, and casualties had dropped dramatically. Statement by the President on the Signing of the Bilateral Security Agreement and NATO Status of Forces Agreement in Afghanistan (Sept. 30, 2014).[11]

Significantly, the United States voluntarily entered into a binding treaty, the Bilateral Security Agreement, marking the end of the original armed conflict and the commencement of a new one. Bilateral Security and Defense Cooperation Agreement, U.S.-Afg.,

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[10] *Available at* https://www.hsdl.org/?view&did=767193.

[11] *Available at* https://obamawhitehouse.archives.gov/the-press-office/2014/09/30/statement-president-signing-bilateral-security-agreement-and-nato-status.

Sept. 30, 2014, T.I.A.S. No. 15-101 ("BSA").[12] Under the BSA, the United States no longer unilaterally or actively conducts hostilities, but plays a subordinate role in the current Afghanistan conflict. The relevant conflict giving rise to Mr. al-Alwi's capture was characterized by unilateral U.S. military action in Afghanistan—in other words, *active* hostilities. The BSA drastically constrains the United States' current, reduced involvement in Afghanistan and limits U.S. military activity to advisory and supportive roles in training, advising, and assisting the Afghan National Defense and Security Forces, and in supporting Afghan counterterrorism operations. The Afghan armed forces are now fully "responsible for securing the people and territory of Afghanistan." *Id.* at 4. The BSA provides that, unless otherwise mutually agreed, "United States forces shall not conduct combat operations in Afghanistan." *Id.* The BSA specifically prohibits the U.S. military from conducting unilateral counterterrorism operations, and constrains U.S. counterterrorism operations in its supporting role. *Id.*

Today, the United States wields no wartime detention authority inside Afghanistan: the BSA provides that "United States forces shall not . . . maintain or operate detention facilities in Afghanistan." *Id.* at 5. Indeed, shortly after executing the BSA, the United States officially ceded exclusive control of the Bagram

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[12] *Available at* https://www.state.gov/documents/organization/244487.pdf.

prison to the Afghan government.[13] If Mr. al-Alwi had been held by the United States in Afghanistan all these years, or if he were captured there today, the United States would have been compelled to release him after it signed the BSA.

B. In Habeas Cases, the Judiciary, Not the Executive, Must Decide Facts Relevant to the Legality of Detention

The court of appeals framed the question as whether "hostilities" had "terminated," and concluded that the political branches had virtually unlimited discretion to answer that question. *Al-Alwi*, 901 F.3d at 298-99. The court relied on *Ludecke v. Watkins*, 335 U.S. 160 (1948), which described the termination of hostilities as a "political act." That case explained that when a statute is "defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government." *Id*. at 169 n.4. A caveat recognized that "[w]hether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled." *Id*. at 169. But in this case, the court below held, "the Executive Branch represents, with ample support from

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[13] *See* Frank Jack Daniel, *U.S. Closes Bagram Prison, Says No More Detainees in Afghanistan*, REUTERS (Dec. 11, 2014), *available at* https://www.reuters.com/article/us-usa-cia-torture-bagram/u-s-closes-bagram-prison-says-no-more-detainees-held-in-afghanistan-idUSKBN0JO2B720141211.

record evidence, that the hostilities described in the AUMF continue. In the absence of a contrary Congressional command, that controls." *Al-Alwi*, 901 F.3d at 300.

The court of appeals erred in its analysis and thereby improperly restricted the judiciary's prerogative in determining the legality of executive detention. Mr. al-Alwi does not argue that the judiciary can declare an end to war—a declaration that could have broad consequences beyond the realm of the judiciary. But Mr. al-Alwi disagrees that, in adjudicating a petition for habeas corpus filed by an individual in military detention, the judiciary must accept the executive's representation that the *relevant* conflict is continuing. That question requires judicial evaluation of a factual record applicable to Mr. al-Alwi, including an understanding of the conflict relevant to his detention.

As *Hamdi* recognized, military detention is permissible only when "the record establishes" that the relevant conflict persists. *See* 542 U.S. at 521. What a "record" might establish is typically a question for the judiciary. *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), for instance, held that federal courts must resolve relevant factual disputes that had not been adjudicated in state courts. And *Boumediene* made clear that, absent valid suspension of the writ, courts cannot cede their habeas authority over wartime detention. *See, e.g.*, 553 U.S. at 745. Excessive judicial deference might grant "the political branches . . . the power to switch the Constitution on or off at will." *Boumediene*, 553 U.S. at 765. Whether a given conflict endures for

purposes of delineating detention authority cannot be left exclusively to the political branches because "even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

International authorities agree that the existence of an armed conflict and the cessation of active hostilities are mixed questions of fact and law, not political judgments or declarations. *See* Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT'L REV. RED CROSS 163, 166-70 (2014); Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUMAN RTS. L. REV. 204, 206, 219, 221 n.61, 233 (2016) ("As with identifying the existence of an armed conflict, under international law, it is the factual situation, rather than political statements or acts, which determines the end of an armed conflict."). Indeed, the "main point of the 1949 Geneva reform was precisely to do away with the subjectivity and formalism of war, and to make the thresholds of application objective and factual." Milanovic, *supra* at 168. Relying on political statements had proven too malleable, enabling politicians to switch the law of war on and off at will. *See id.*

The Geneva Conventions themselves support the commentators' views. The Fourth Geneva Convention uses the term "close of hostilities." Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art 133, Aug. 12, 1949. The principal

commentary to Article 133 clarifies that close of hostilities "should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities." INT'L COMM. RED CROSS, COMMENTARY: GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 514-15 (J. Pictet gen. ed., 1958).

In short, whether there has been a "cessation of active hostilities" in connection with the relevant armed conflict—for purposes of deciding in a habeas proceeding if detention remains lawful—is a question for the judiciary to determine based on the factual record.

C. Whether the Judiciary Has Any Role in Determining the End of a Relevant Conflict for Purposes of Military Detention Is an Important Question that Should Be Answered in this Case

The judiciary is traditionally reluctant to intrude upon executive authority in military affairs. Nevertheless, the courts' constitutional authority to issue writs of habeas corpus applies to indefinite military detention—as well it should, because no other form of detention poses a greater threat to liberty. *See*, *e.g.*, *Hamdi*, 542 U.S. at 530 (citing *Ex parte Milligan*, 4 Wall. 2, 125 (1866)). The danger is especially acute if courts defer not only to the executive's decision that hostilities are continuing, but also to the executive's decision that the hostilities are part of the "relevant conflict." Deference

of that magnitude would permit the executive to extend military detention for any length of time so long as it claims that hostilities of any type continue. Habeas exists because the founders feared that the executive might not operate in good faith, and instead would incarcerate political enemies and other inconvenient individuals on whatever pretext was available.

This case presents an ideal opportunity to define the extent of the judicial power to check indefinite and possible lifelong detention while the United States manages a series of low-grade military conflicts that wax and wane in intensity, morph and relocate in battlefield, realign and reconstitute in participants, and recalibrate and revise in objectives. This should be done in the light of facts applicable to Mr. al-Alwi, a Yemeni national who grew up in Saudi Arabia and, at age twenty or so, traveled to Afghanistan *before* 9/11. He allegedly assisted Taliban forces, again before 9/11, in their fight against the Northern Alliance. He fled Afghanistan when the United States launched its war, but not quickly enough, according to the court of appeals' prior decision. *See Al Alwi v. Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011). By January 2002 he was in Guantánamo, where he has remained for nearly seventeen years. During that time the United States has conducted military operations generally aimed at "terrorism" in Afghanistan, Pakistan, Iraq, Syria, Yemen, Libya, and elsewhere. If Mr. al-Alwi were released today, he would be transferred to the custody of Saudi Arabia, not a place that reasonably could be construed as the battlefield, and there is no reason to

assume that he would be interested in joining the ongoing conflict, whatever that is. Yet the decision below compels complete deference so long as the executive says, in effect, that the conflict is the same now as it was when Mr. al-Alwi was detained.

To be clear, Mr. al-Alwi is not arguing that courts have the authority to declare war, or its end. His argument would not have any material impact on the military's ability to detain enemy fighters during the current hostilities. As a practical matter, a ruling in his favor would not impede the military from detaining anyone for a reasonable period. But seventeen years is enough. Habeas is "an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536. If the judiciary yields to executive declarations in the face of contrary facts, then habeas is no check at all, and the courts fail to play their "necessary role in maintaining this delicate balance of governance." *Id*.

III. This Court Should Determine Whether Individuals Who Have Not "Engaged in Armed Conflict" Against the United States Can Be Lawfully Detained

Justice Breyer, in a statement accompanying denial of certiorari in *Hussain*, 572 U.S. 1079, noted this Court "has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not 'engaged in an armed

conflict against the United States' in Afghanistan prior to his capture." This narrow question of law—ripe in one Justice's view since at least 2014—relates to the court of appeals' misinterpretation of statutory authority and this Court's precedent. Although not directly raised below, this question applies to Mr. al-Alwi and bears on a matter of vital national interest: who may the executive lawfully detain in military prison without charge, potentially for life.

A. The Lower Courts' Definition of Who Is Detainable as an "Enemy Combatant" Is Irreconcilable with Precedent and Statute

In 2004, this Court concluded that the AUMF "authorized detention in the *narrow* circumstances considered here." *Hamdi*, 542 U.S. at 519 (emphasis added). It defined a detainable "enemy combatant" as someone who "would need to be 'part of or supporting forces hostile to the United States or coalition partners' *and* 'engaged in an armed conflict against the United States' to justify his detention in the United States for the duration of the relevant conflict." *Id.* at 526 (emphasis added).

In 2008, Mr. al-Alwi's first habeas litigation resulted in a finding that he had been "part of or supporting Taliban or Al Qaeda forces," but the district court also concluded that "there is no evidence of petitioner actually using arms against U.S. or coalition forces." *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 28 (D.D.C. 2008).

Disregarding *Hamdi*'s limitation on the class of detainable individuals, the district court instead applied the broader definition it had adopted earlier that year:

> [N]otwithstanding the fact that the Supreme Court and our Circuit Court have not as yet passed on the lawfulness of this definition . . . [a]n "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Boumediene v. Bush, 583 F. Supp. 2d 133, 134-35 (D.D.C. 2008).

Then, prior to hearing Mr. al-Alwi's appeal in 2010, the court of appeals upheld the district court's "enemy combatant" definition in *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010). Rejecting this Court's narrowly circumscribed definition in *Hamdi* that required findings of membership *and* engagement in armed conflict against the United States or its coalition partners, the court of appeals decided "that both prongs are valid criteria that are independently sufficient to satisfy the standard." *Id.* at 874. Viewed below as binding law of the circuit, the flawed decision in *Al-Bihani* has foreclosed review of this important question of federal law.[14] Indeed, both panels hearing

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[14] *See, e.g.*, *Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013) ("Nothing has changed since we rejected those arguments

Mr. al-Alwi's appeals in 2010 and 2018 believed they could not evade *Al-Bihani* and the court of appeals denied Mr. al-Alwi's 2017 petition for hearing en banc. *Al-Alwi v. Trump*, 2017 WL 6803406 (D.C. Cir. Nov. 15, 2017).

It bears emphasis that this Court's circumscribed definition of who is detainable was informed by the same longstanding law-of-war principles that allowed for detention authority to be read into the AUMF in the first place. *See Hamdi*, 542 at 518 (finding that "detention of individuals falling into the *limited category* we are considering" was a "fundamental and accepted . . . incident to war") (emphasis added). So, too, did this Court's decision in *Hamdan* rest on considerations of international humanitarian law and customary international law. *See* 548 U.S. at 628-29, 633 (noting that "compliance with the law of war is the condition upon which [courts-martial] authority . . . is granted" and holding Guantánamo prisoner could invoke Geneva Conventions to challenge military commission). It is necessary, then, for this Court to return to law-of-war principles.

[that detention is permitted only for detainees who engaged in active hostilities] only months ago. We are bound by our precedent and therefore reject Hussain's challenges."), *cert. denied*, 572 U.S. 1079 (2014); *Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012); *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011); *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010); *Odah v. United States*, 611 F.3d 8, 10 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416, 423, 427 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010).

Customary international law is clear in this respect: a combatant, whether lawful/privileged or unlawful/unprivileged, *must* be a person who has engaged in armed hostilities. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I, Rule 4 (2005) ("[A] combatant is any person who, under responsible command, engages in hostile acts in an armed conflict on behalf of a party to the conflict.").[15]

Mr. al-Alwi "was picked up in Pakistan in late 2001 by Pakistani authorities," *Al Alwi v. Bush*, 593 F. Supp. 2d at 26, having fled Afghanistan without any indication he even fired a shot against the United States or its allies. This Court's precedents, its construction of the AUMF, and law-of-war principles require direct participation in hostilities for him to be lawfully detainable. The court of appeals' rulings in this and other cases stray from these authorities.[16] Its definition of who is detainable therefore must be reined in.

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[15] *Available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4 (last visited Nov. 11, 2018). *See also* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged" Combatants*, 85 INT'L COMM. RED CROSS, no. 849 (Mar. 31, 2003), at 45, 46 ("[T]he term 'unlawful/unprivileged combatant/belligerent' is understood as describing all persons taking a direct part in hostilities without being entitled to do so.").

[16] The requirement of engaging in active hostilities is dispensable only if an individual was *actually* captured in a recognized theater of war. *Cf. Hamdan*, 548 U.S. at 597-600 (noting that laws of war cannot be violated if alleged acts occur outside a theater of war).

B. This Court Can Correct the Departure from its Precedent in this Case

The Court should grant Mr. al-Alwi's request that it exceptionally review this question in the first instance. In this litigation, Mr. al-Alwi did not seek to relitigate the factual determinations made by the district court in his earlier 2008 habeas case, though he did not concede their accuracy. He neither challenges nor concedes the accuracy of those factual determinations in the present petition to this Court. Instead, he asks the Court to answer a pure question of law that has yet to be resolved.

While this Court generally does not consider questions of law not raised in the lower courts, "[i]t is well settled . . . that the Court's practice of declining to address issues left unresolved in earlier proceedings is not an inflexible rule." *Boumediene*, 553 U.S. at 772. In exceptional circumstances, such as those presented in this case, this Court has departed from this general rule. In *Boumediene*, this Court weighed the gravity of the issues raised, the duration of potentially unlawful detention, and the harm resulting from additional delay in deciding to hear an issue not addressed below. *Id*. Defining whom the executive may detain is a matter of grave national importance. Further, Mr. al-Alwi's seventeen-year imprisonment on the basis of an erroneous construction of federal and international law, and the harm that flows daily from his continued deprivation of liberty, underscore the need for the Court to take up this issue.

This Court has also considered issues not raised in lower courts that were "not foreign to the subject matter of the complaint," *Youakim v. Miller*, 425 U.S. 231, 234 (1976), and where "[t]he evidentiary record in the trial court is adequate to permit consideration of the contention" and "[t]he material facts are not disputed." *United States v. Mendenhall*, 446 U.S. 544, 552 (1980). The question presented in the first instance here is unquestionably tied to the legality of Mr. al-Alwi's imprisonment and is thus not foreign to his habeas petition. Mr. al-Alwi asks this Court to rule if the definition of "enemy combatant" that has been applied to him squares with the one it adopted in *Hamdi*.

Further, if the lower courts' precedents suggest they would have rejected the argument, its presentation here in the first instance is "at most only marginally subject to the rule that this Court will not consider issues 'not pressed or passed upon' in the court below." *Youakim*, 425 U.S. at 235. This Court can also consider a question not raised below when an "assumption, embraced by the trial court and the Court of Appeals, rests on a serious misapprehension of federal constitutional law." *Mendenhall*, 446 U.S. at 552. The question posed to this Court is squarely one of federal and constitutional law: whether either the AUMF or the Constitution permits the executive to detain individuals who have not engaged in armed conflict against the United States. Because the court of appeals' decision in *Al-Bihani* has been read to foreclose review of this question in the D.C. Circuit,[17] raising this question to

[17] *See supra* note 14.

the district court or the court of appeals would have been futile. It will remain so without a ruling by this Court.

Since no court has ever found that Mr. al-Alwi used arms against the United States or its allies, this Court should now decide if the definition of "enemy combatant" that has permitted his continued detention is supported by the AUMF and the Constitution.

CONCLUSION

If Guantánamo is to become the isle of lifelong imprisonment without trial, its charter should not be written by the nation's inferior courts. Eighteen years into an unending war and ten years since this Court last spoke on military detention at Guantánamo, the executive has made clear its intention to keep the prison open. It is now necessary for the Court to revisit the limits of detention. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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